No. 10,333

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

Appellees.

Brief of Appellees, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, James S. Hazen and Persis E. Hazen.

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Brief of Appellees, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, James S. Hazen and Persis E. Hazen.

The appellees submitting this brief are named in the petition for the order to show cause why they

have not joined in a conveyance of title to an undivided three fourths interest in certain mining properties (Tr. pp. 3 and 4). Included among those mentioned in the decision of the lower Court, who interposed motions to dismiss (Tr. top of p. 47), are these appellees.

In our judgment, the "opinion and decision" of the lower Court is demonstrative of the soundness of the Court's ruling (Tr. p. 46 et seq.). In addition, two other sets of appellees are filing briefs, which we have examined and which we are satisfied to adopt as a presentation of our own views. For these two reasons, this brief will be concise; repetition of the authorities and arguments embodied in the briefs of the other appellees will be avoided.

I.

The language of the agreement plainly supports the decision and requires no construction.

For convenience, we repeat the option clause upon which the appellant's case rests, adding appropriate emphasis:

(Tr. pp. 4 and 5)

> "Said Owner, for and by the considerations and agreements herein therefore grants unto the lessees an option to purchase an undivided three-fourths (¾) interest in said mine, property and all appurtenances thereto for the sum of Fifty Thousand Dollars ($50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars

> ($10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars ($10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars ($50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourth (¾) interest in said property herein permitted to be sold in the event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.'

We assent at the outset that there is no room for construction or interpretation of the agreement. The language at the conclusion of the paragraph, which we have emphasized above, is perfectly plain in providing that royalties and rental payments are to be applied on the purchase price only in the event that Ten Thousand Dollars is paid "in cash" at the time of notice of the exercise of the option and after such first installment (contemplating the payment of Ten Thousand Dollars), the designated proportion of the royalties and rental payments are to be applied on the purchase price.

The meaning of the contract for which the appellant contends, would be greatly unfair to the appel-

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The two terms may here be considered synonymous. The agreement does not call for bids, but provides that "royalty payments are to be considered as a rental only" (R., bottom of p. 20).

lees. It would place the lessee in the highly advantageous position of standing by with the obligation merely to pay rent out of the production from the property and then suddenly, when finding that profitable returns had ensued, announcing his ownership of a large proportion of the title, by the execution of a piece of paper. It cannot be surmised that the parties intended the contract to possess this unfair result.

II.

The appellant's brief fails to recognize the elementary rule that an appellate court will not substitute its own interpretation of an agreement for that of the trial court, where the latter appears logical and reasonable.

Even if the appellant's suggested interpretation of the agreement were plausible, it fails to establish a ground for the reversal of the order. The rule is well settled that a court of review will not substitute its own interpretation of a contract for the one adopted in the trial Court, even though the suggested new meaning be equally tenable with that adopted in the trial Court. This is but a specific application of the rule that the burden is on an appellant to establish error.

Extending to the appellant's contention undoubtedly more credit than it deserves, the most that possibly could be said of it is that it offers a construction of the contract "equally tenable" with that taken in the trial Court. Even if this be true, no ground for re-

versal appears, by reason of the rule we have stated. The doctrine has been announced on many occasions.

As the Court stated in

Kautz v. Zurich Gen. Acc. & Liab. Ins. Co., 212 Cal. 576, 582:

"The construction given the instrument by the trial court appears to be consistent with the true intent of the parties and where that is the case the appellate court will not substitute another interpretation though it seem equally tenable."[2]

Ruffenach v. Peoples Trust Co. (Pa. 1935), 178 Atl. 668:

"It would serve no useful purpose to extend in detail the evidence or reasoning of the court below in the interpretation of the agreement. When the sole question is the proper interpretation of an agreement * * * this court will not disturb such interpretation[3] as controlling the rights and obligations of the parties, unless the parties have by their acts interpreted the agreement differently."[4]

In accord:

Serviss v. Jones, 133 Cal. App. 640, 643;
Farmers and Merchants National Bank v. Bailie, 138 Cal. App. 143, 149 (middle);
Hale v. Harbor Petroleum Corp., 139 Cal. App. 455, 462.

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[2]Emphasis ours.

[3]Referring to the interpretation announced by the trial court.

[4]We shall presently observe that the parties here interpreted the contract in accord with the meaning of it determined upon in the lower court.

In accord:

Payne v. Pathe Studios Inc., 6 Cal. App. (2d) 136, 140 (middle);

Melvin v. Berendsen, 7 Cal App. (2d) 389, 391 (middle);

Swerdfeger v. United Acceptance Corp., 9 Cal. App. (2d) 590, 593 (bottom).

As heretofore stated, we think the appellants suggested meaning of the contract a highly unreasonable one. However, it is not necessary, under the application of the rule we have set forth, that appellees establish infirmities in the appellant's offered construction. That such a burden does not rest upon an appellee is well stated in

Whepley Oil Company v. Associated Oil Company, 6 Cal. App. (2d) 94, 101 (middle):

"We are not prepared to declare that the construction for which appellant contends is an unreasonable construction. Equally unprepared are we to declare that the interpretation drawn by the trial court is unreasonable or untenable or so clearly inconsistent with the intent of the parties as disclosed by their language that we must substitute therefor the interpretation for which appellant contends. In such a situation, it is settled that a reviewing court is not justified in disturbing the construction adopted by the trial court." (Citing authorities)

III.

The record demonstrates that by the practical construction taken by the parties themselves the contract of lease had the meaning given to it by the lower court.

The attempted exercise of the option, unaccompanied by any cash, occurred in May of 1937 (Tr. p. 26). The appellant's predecessor in interest was immediately advised of the ineffectiveness of the so-called notice, by reason of the failure to pay the ten thousand dollars. (Tr. pp. 26 to 28).

The petition discloses that, continuously thereafter, "royalties", in the language of the petition (Tr. p. 8), were paid until August 28, 1939. These payments were made to such extent that over-payments are now claimed upon the theory that the attempted exercise of the option was valid.

It is manifest that the lessee appreciated the soundness of the position bringing about the rejection of the attempted exercise of the option and thereafter acquiesced in the interpretation of the contract embodied in the letter of rejection. (Tr. pp. 26 to 28).

17 *C. J. S.* 755, Sec. 325:

> "Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction may be considered by the court in construing the contract, determining its meaning, and ascertaining the mutual intention of the parties at the time of contracting; it is entitled to great, if not controlling, weight in determining the proper interpretation of the contract and it will generally be adopted by the court.

> "* * * the court may and usually will adopt a construction placed on the contract by the parties where it is within the purview of, and is not inconsistent with, the language thereof, even though the contract may be susceptible of another construction."

In

Chick v. MacBain (Va. 1931), 160 S. E. 214,

it was held that a failure to protest against the denial of an asserted right under the contract was one of the most effective methods of reaching a practical construction of the contract by the parties themselves.

The following cases present analogous instances, where the construction of the instrument by the parties thereto has been announced by the courts as the most reliable method of disclosing the true and intended meaning of the contract.

Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481;
King v. Moore, 220 Cal. 449, 457.

The case at bar is an ideal one for the application of the rule of practical construction. The lessee continued making royalty payments, as such, with full knowledge that its nebulous claim, on the meaning of the contract, was rejected. The payments continued for twenty seven months, with no step taken to assert the option privilege. The return to the appellant's abandoned theory results in claims of so-called overpayments. It is manifest that the parties mutually recognized that the payments continued to be rental, as designated in the first portion of the lease.

IV.

The rule requiring conditions precedent to the valid exercise of an option is a salutary one and is to be applied in this case.

The other appellees have cited many authorities to the effect that conditions precedent relating to the exercise of an option must be fully performed. It is unnecessary to enlarge upon those citations.

No advantage has been taken of the appellant or his predecessor in interest. Full information was given as to the reason for the rejection of the so-called notice. Not a step was taken to perfect the option right in the manner called for by the contract. Payments continued to be made in a manner consistent only with the continued relationship of landlord and tenant.

We therefore submit that the provisions of the contract speak for themselves in sustaining the position of the trial judge and that even were the contract to possess the ambiguities ascribed to it by the appellant, the other grounds herein asserted are amply sufficient to uphold the ruling of the trial court.

V.

The appellant has failed to produce a record sufficient for the ascertainment of error.

It is elementary that regardless of the particular ground designated in the opinion and decision of the lower Court, the order is to be affirmed if sustainable on any ground.

> *Chabot v. Tucker,* 39 Cal. 434, 435 (bottom);
> *Difani v. Riverside County Oil Co.,* 201 Cal. 210, 217.

It affirmatively appears from the record (Tr. top of p. 47) that various grounds were interposed in support of a motion to dismiss. The appellant's brief reviews only the one ground—the one discussed in the trial Court's opinion. The appellant fails to show that the order of the trial Court is not sustainable upon any of the grounds of motion. Under the doctrine that the burden is on the appellant to show error, the appellant's brief must be considered wholly insufficient.

Dated: March 5, 1943.

Respectfully submitted,

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